



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 8, 1996

Ms. Patricia Hershey
Staff Attorney
Litigation Support Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0494

Dear Ms. Hershey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 36710.

The Texas Natural Resource Conservation Commission (the "commission") received a request for seven categories of documents relating to Allied Tube and Conduit Corporation ("Allied") and Tex-Tin Corporation ("Tex-Tin"). You state that the commission has made some of the requested information available to the requestor. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.103(a), 552.107, and 552.110, and 552.111 of the Government Code and the informer's privilege as incorporated by section 552.101 of the Government Code. At this time, we are not ruling on the commission's claimed exception under section 552.110 of the Government Code. We will rule on that portion of your request after soliciting additional briefing based on this office's decision in Open Records Decision No. 639 (1996). You may withhold the documents that are the subject of your claimed section 552.110 exception pending our ruling on that exception.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

The Governor of Texas has designated the commission as one of the trustees for the state's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1321(c). *See* 40 C.F.R. § 300.605¹ As a trustee, the commission may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous material or oil. *See* Nat. Res. Code § 40.107. You state that the commission has begun a natural resources damage assessment on Tex-Tin. You state that the assessment will result in either a settlement or litigation and that, therefore, litigation is reasonably anticipated. We conclude that the information you claim is excepted under section 552.103(a) relates to settlement negotiations and/or reasonably anticipated litigation to which the commission is or may be a party. Therefore, with the exceptions noted below, the commission may withhold the requested Tex-Tin documents under section 552.103(a).

The commission may not withhold documents that the opposing parties have previously seen or had access to. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

You claim that certain highlighted portions of Allied Tube documents are excepted from disclosure under sections 552.107(1) and 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We conclude that the highlighted information in the first two submitted Allied Tube documents may be withheld under section 552.111.

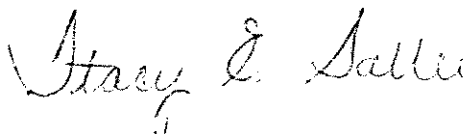
¹The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

²We note that, as to the Tex-Tin documents that the opposing parties have already seen or had access to, section 552.111 also will not except those documents from disclosure. Open Records Decision No. 435 (1986) (section 552.111 waived by release of information to public).

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We conclude that the information contained on the third submitted Allied Tube document may be withheld under section 552.107(1) of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 36710

Enclosures: Submitted documents

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